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JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]18

THE TERRITORY OF NEW MEXICO ex REL. E. J. McLEAN & COMPANY, APPELLANT,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

BRIEF ON BEHALF OF APPELLEE.

CHAS. A. SPIESS,
D. J. LEAHEY,
A. C. CAMPBELL,
Attorneys for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20543

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STATEMENT.

This is an appeal from the judgment of the supreme court of the Territory of New Mexico, wherein that court affirmed a judgment of the district court sitting within and for the county of Santa Fé, in the Territory of New Mexico, sustaining a motion to quash an alternative writ of mandamus issued upon the relation of E. J. McLean & Company *vs.* The Denver and Rio Grande Railroad Company. From the writ it appears that the relators, appellants, had delivered to the agent of the defendant at Santa Fé, New Mexico, a bale

of dry hides consigned to relators at Denver, Colorado, to which point from Santa Fé the defendant's railroad line extended; that the defendant railroad company refused to receive and ship said bale of hides for the reason that they were to be forwarded beyond the boundary line of the Territory and did not bear the requisite evidence of inspection by an authorized inspector of the cattle sanitary board of New Mexico, as required by section 3 of the act of the legislature of the Territory approved March 19, 1901. Sections 3 and 4 of the act are as follows:

> "SECTION 3. Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company, or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office."
>
> "SECTION 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any of the provisions of this act or refusing the inspection of any hides as herein provided shall upon conviction thereof be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

ARGUMENT.

I.

JURISDICTION TO ENTERTAIN THE APPEAL.

A preliminary question is, Has this court jurisdiction to entertain the appeal?

The act of Congress of March 3, 1885, 23 Stats. at Large, 443, contains the grant of power conferring jurisdiction upon this court to review judgments of the supreme courts of Territories.

Section 1 of the act provides that no appeal or writ of error shall be allowed from any judgment or decree in any suit at law or in equity in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

Section 2 provides that section 1 shall not apply to any case wherein is involved the validity of a treaty or statute of or an authority exercised under the United States, but that in all such cases an appeal or writ of error may be brought without regard to the *sum or value* in dispute.

The matter in dispute in this case not exceeding five thousand dollars, jurisdiction to review this judgment is not granted by section 1 of the act.

It now remains to consider whether the exception contained in section 2 of the act confers jurisdiction upon this court.

Section 2 excepts from the operation of section 1 all cases wherein is involved the validity of any patent or copyright or in which is drawn in question the validity of a *treaty* or *statute of* or *an authority exercised under* the United States and provides for a review of judgments in such cases without regard to the sum in dispute.

It appears from the record in this case that the controversy concerns the validity of a statute *not* of the United States, *but* of the Territory of New Mexico, and that the matter in dispute is the duty of the respondent common carrier to receive for transportation the hides tendered it by the relator, E. J. McLean & Company.

The judgment of the New Mexico court in effect is that the duty did not exist.

Had the judgment been for relator the effect of the judgment simply would have been that the duty to receive the hides for transportation *did* exist, and under the mandate of the New Mexico court the respondent would have been required to both receive and transport the hides tendered it by relator, notwithstanding the New Mexico statute, the validity of which is, by this action, drawn in question.

In either case the pecuniary status of both relator and respondent would have been the same and by the judgment of the court would have remained unchanged.

It is thus apparent that the dispute in this cause concerns nothing of pecuniary value, but merely the existence or nonexistence of a duty not capable of being estimated in money values.

Under section 2 of the act there must be a controversy, first, drawing in question the validity of a statute of or authority exercised under the United States, and, second, there must be involved in the controversy something of a pecuniary value or some matter the value of which may be estimated in money. Unless both these elements are presented by the controversy this court is without jurisdiction to review this judgment.

The controversy does not draw in question the validity of a statute of or authority exercised under the United States.

To draw in question the validity of a statute or authority exercised under the United States it is plainly evident that the record must somewhere present a denial of such validity.

There is no assertion anywhere in this record that a statute

or authority of the United States is invalid. The validity of a thing can only be questioned by an affirmative assertion of its invalidity.

The measure of jurisdiction is not controlled or in any manner influenced by the assertion that the New Mexico act is unconstitutional as being in conflict with the interstate commerce clause of the Constitution.

Jurisdiction is made to depend entirely on an assertion that a statute of or authority exercised under the United States is invalid and in a cause where something of value is disputed over.

It is evident that the validity of a statute of the United States is not by this action drawn in question. Is the validity of "an authority exercised under the United States" drawn in question? An authority exercised under the United States evidently refers to some tribunal or power brought into existence by the Congress of the United States. The New Mexico legislature is the authority of which relators complain, but they do not assert the invalidity of that authority. They merely assert that an act of that authority is invalid. The validity of the power or authority that performed the act is not challenged, but it is asserted that a lawful and valid authority or tribunal committed error in the exercise of its jurisdiction by enacting an invalid law.

There is a plain and manifest distinction between drawing in question the validity of *an authority* and the validity of *an act* of that authority.

The utmost that can be claimed with respect to the case at bar is that it involves a dispute, not as to the *validity* of an authority exercised under the United States, but concerning the rightful and proper exercise of power by a conceded valid authority.

This court has in numerous cases held that it was without jurisdiction to review judgments such as this one wherein was drawn in question, not the validity of a statute of or

authority exercised under the United States, but the validity of the thing done or act performed by the authority; thus In Snow *vs.* United States, 118 U. S., 346, this court said:

> "In the present case, the validity of a statute of the United States is not drawn in question. No such question is presented by the bills of exceptions, or the requests for instructions, or the exceptions, to the charges, or anywhere else in the records. Nor is the validity of an authority exercised under the United States drawn in question. The plaintiff in error contends that the construction of the act of 1882 is drawn in question, and also the authority exercised under the United States by which he was tried and convicted; that the authority of the United States is invoked to deprive him of his liberty, in a court established by Congress, and acting solely by Federal power; and that the question is, whether the authority exercised by the court under the act of 1882 is a valid authority, and within the scope of that act, because the contention is that the court misconstrued the statute and acted beyond the authority which it conferred. The authority exercised by the court in the trial and conviction of the plaintiff in error is not such an 'authority' as is intended by the act. The validity of the existence of the court, and its jurisdiction over the crime named in the indictments, and over the person of the defendant, are not drawn in question. All that is drawn in question is whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this court in every criminal case in a territory where the prosecution is based on a statute of the United States; and, indeed, might go still further, for the authority of every court sitting in a Territory is founded on a statute of the United States. From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of 'an authority exercised under the United States' is drawn in question."

And in Baltimore and Potomac R. Co. *vs.* Hopkins, 130. U. S. 210, wherein this court cited the case of Millinger *vs.* Hartupee, 72 U. S., 6 Wall., to the effect that:

> "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real *existence*, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States." "In many cases the question of the *existence of an authority* is so closely connected with the question of its *validity* that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where, as in this case, the single question is not of the validity but of the existence of an authority, and we are fully satisfied that there was, and could have been, no decision in the State court against any authority under the United States existing in fact, and that we have, therefore, no jurisdiction of the case brought here by writ of error, we can perceive no reason for retaining it upon the docket."

this court said:

> "The jury were told that all stoppage of trains and shifting of cars necessary for carrying cars out of its freight depot over the different tracks for the purpose of making up freight trains were lawful. The right of the railroad company to establish freight stations or to lay as many tracks 'as its president and board of directors might deem necessary,' was not questioned. But the court also held that the company was not justified in occupying the public streets for the purposes of a freight yard, as such, because the various statutes bearing upon the matter did not authorize such occupation, with which conclusion we are inclined to agree, though we forbear a determination of the point

until presented in a case properly pending before us. *The validity of the statutes*, and the *validity of authority* exercised under them, are, in this instance, *one and the same thing*, and 'the validity of a statute' as these words are used in this act of Congress, refers to the *power* of Congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power. In our opinion the validity of no act of Congress, or authority under the United States, was so drawn in question here as to give us jurisdiction, and therefore, as the amount of the judgment did not exceed five thousand dollars, the writ of error must be dismissed."

And in Lynch *vs.* United States, 137 U. S., 280, this court said:

"It is now argued that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the act of 1835, and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage, these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, *nor is the* validity of an authority, every time an act done by such *authority is disputed*. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

"We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned, but that what is claimed is that in the exercise of a valid authority, the Auditor and Comptroller erred

in respect to an allowance, in view of the decision of this court in another case."

"The contention of the relator is, that the interpretation he puts upon the act is too obviously correct to admit of dispute, and that this court has so decided; but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way, and this order the supreme court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority (Snow *v.* United States, 118 U. S., 346, 353; Baltimore and Potomac Railroad Co. *v.* Hopkins, 130 U. S., 210)."

And in Cameron *vs.* United States, 146 U. S., 533, this court said:

"Nor can our jurisdiction be sustained under the second section of the act of March 3, 1885, providing that the limit of $5,000 shall not apply to any case 'in which is drawn in question the validity of a * * * statute of or an authority exercised under the United States;' since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the case, and not to the validity of an authority exercised by the United States in removing the fence pursuant to the judgment of the court. If the latter were the true construction, then every case in which the court issued an injunction or an execution might be said to involve the validity of a statute or an authority exercised under the United States, since it is by virtue of such authority that the marshal executes the writ. No question is raised here as to the

validity of a statute, but merely as to the application of the statute to this case."

And in Seymour *vs.* South Carolina, 152 U. S., 353, this court said:

"and if the value of the registration is susceptible of an estimate in money, there is no evidence whatever in the record tending to show this value."

"It is not, and could not be, pretended that in this case there was 'involved the validity of any patent or copyright;' and, in the light of previous decisions of this court, it is quite clear that there was not 'drawn in question the validity of a treaty or statute of or an authority exercised under the United States.'"

And in Linford *vs.* Ellison, 155 U. S., 503, this court said:

"It is thus seen that the decision of the supreme court of the territory involved the construction of the organic law and the scope of the authority to legislate conferred upon the territorial legislature; but that the validity of that authority and of the statute was not drawn in question. In order to give us jurisdiction of this appeal, the matter in dispute exclusive of costs must have exceeded the sum of $5000, or else, without regard to the sum or value in dispute, the validity of a patent or copyright must have been involved or the validity of a treaty or statute of or an authority exercised under the United States have been drawn in question. Act of March 3, 1885, C. 355, 23 Stat. 443. Confessedly, the matter in dispute here did not reach the requisite pecuniary value, and the validity of no patent or copyright was involved, nor was the validity of a treaty questioned; and, as just stated, we are of opinion that the validity of no statute of the United States, nor of an authority exercised under the United States, was drawn in question within the intent and meaning of the jurisdiction act."

Linford *vs.* Ellison, *supra*, is exactly in point upon this inquiry, indeed it absolutely controls the question of juris-

diction in the case at bar. In that case the judgment of the supreme court of Utah Territory "involved the construction of organic law (statutes of the United States) and the *scope of the authority* to legislate conferred upon the legislature of "Utah." In the case at bar the most that can be said in favor of jurisdiction to review this judgment is that "*the scope of the authority* to legislate conferred upon the New Mexico legislature is drawn in question," but as was said in that case, "the validity of that authority *and* of the organic act conferring the authority (statute) was not drawn in question."

Comparing the above cited cases wherein it was held that this court was without jurisdiction to review the judgment of the supreme courts of the Territories and the District of Columbia, because there was *not* drawn in question the *validity* of a statute of or authority exercised under the United States, with the case of *Clough vs. Curtis*, 134 U. S., 361, where this court held it had jurisdiction because there was "directly drawn in question the lawful existence" of the territorial legislature of Idaho, and the case of *Traction Co. vs. Hof*, 174 U. S., 1, where this court entertained jurisdiction because there was drawn in question the validity of certain acts of Congress (statutes of the United States), it is at once apparent and easily determined which judgments of the supreme courts of the Territories may and which may not be reviewed by this court, and that the case at bar falls within the rule announced in Linford *vs.* Ellison, *supra*.

Even if it could be held that the validity of an authority exercised under the United States was in this cause drawn in question, still there is nothing of pecuniary value or matter the value of which is capable of being estimated in money involved in the controversy, and this court is for that reason without authority to review the judgment rendered in it.

It has been many times held by this court that in order to sustain the appellate jurisdiction of this court under either

section of the act of Congress of March 3, 1885, the matter in dispute must have been money or something, the value of which can be estimated in money.

Perrine *vs.* Slack, 164 U. S., 452.
Durham *vs.* Seymour, 161 U. S., 235.
Kurtz *vs.* Moffitt, 115 U. S., 487, 495, 496.
Caffrey *vs.* Oklahoma, 177 U. S., 346.
De Kraft *vs.* Barney, 2 Black, 704.
In re Chapman, 156 U. S., 211.
Cross *vs.* Burke, 146 U. S., 82.
In re Heath, 144 U. S., 92.
Farnsworth *vs.* Montana, 129 U. S., 104.
Sinclair *vs.* Dist. of Columbia, 192 U. S., 16.

The matter in dispute in this case was not money, and the remaining inquiry is whether it is a right the value of which can be ascertained in money.

As we have already indicated, the pecuniary status of the appellant has not been changed by this judgment. In Caffrey *vs.* Oklahoma Territory, 177 U. S., 346–349, this court said: "In the pending action the plaintiff in error and appellant has neither gained nor lost any money's worth by the judgment of the supreme court of the Territory." What can appellant in this action claim he has been deprived of by this judgment? The amount of freight for hauling the hides is not in controversy. The charge for hauling the hides is the same whether they were inspected or not inspected. He is neither charged with nor relieved from the payment of the inspection fee of ten cents per hide required to be paid by the New Mexico statute, nor does the judgment cast upon appellant the duty of defraying the inspection fees.

The collateral effect of the judgment cannot be inquired into in this inquiry for the purpose of determining whether this court has jurisdiction. The judgment itself must carry with it the elements which confer jurisdiction.

In Elgin *vs.* Marshall, 106 U. S., 578, this court held that the matter in dispute on which the jurisdiction of this court depends "is the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered; and the court is not permitted for the purpose of determining its sum or value to estimate its collateral effect in a subsequent suit between the same or other parties."

See also Bruce *et al. vs.* Manchester and Keene R. R. Co., 117 U. S., 514.

In Durham *vs.* Seymour, 161 U. S., 235, there was involved the question whether Durham was entitled to receive a patent for his invention. The appeal was dismissed, the court saying:

> "The right to apply for a patent was being availed of in this proceeding, and the invention cannot be regarded for jurisdictional purposes as in itself property or a right of property having an actual value susceptible of estimation in money.
>
> "Whether the alleged invention were patentable or not was the question, and that question had no relation to its value in money. If the invention were not patentable, Durham had suffered no loss; if the invention were patentable, it was not material whether it had or had not a money value.
>
> "The bill, properly enough, does not allege that any sum of money was in dispute, although there are averments that the value of the invention is generally recognized, and that sundry persons are deriving large profits in making the device sought to be patented. Evidence of that kind, though not controlling, is sometimes introduced in suits on patents as indicative of invention in the production of new and beneficial results, but it is not relevant here, nor are the affidavits presented on the question of value if the patent were granted. The matter in dispute must have actual value, and that cannot be supplied by speculation on the possibility that, in a given case, an invention might be held patentable."

In *In re* Belt, petitioner, 159 U. S., 95–100, this court observed:

> "We have heretofore decided that this court has no appellate jurisdiction over the judgments of the supreme court of the District of Columbia, in criminal cases, or on *habeas corpus;* but whether or not the judgments of the supreme court of the District, reviewable in the Court of Appeals may be reviewed ultimately in this court in such cases, when the validity of a statute of or an authority exercised under the United States is drawn in question, we have as yet not been obliged to determine."

But in Washington and Georgetown Railroad *vs.* District of Columbia, 146 U. S., 227–231, it was held that

> "Both sections of the acts of March 3, 1885, regulating appeals from the supreme court of the District of Columbia apply to cases where there is a matter in dispute measurable by some sum or value in money."

However, in Chapman *vs.* United States, 164 U. S., 436, this court by its opinion in that case foreclosed all speculation as to whether it was requisite that there should be some sum or a matter capable of being estimated in money in dispute in order to give this court jurisdiction to review judgments of the supreme courts of Territories under the second section of the act of March 3, 1885. In citing Farnsworth *vs.* Montana, 129 U. S., 104, the court said (p. 448):

> "In Farnsworth *v.* Montana, in which it was claimed that the validity of an authority exercised under the United States was drawn in question, it was held that the second section of the act did not extend to criminal cases, but that both sections applied to cases where there was a matter in dispute measurable by some sum or value in money. The view taken was that the second section contained an exception or limitation carved out of the first section, and that the words, that in the enumerated cases, 'an appeal or writ of error may be brought without

> regard to the sum or value in dispute,' clearly implied that in those cases also there must be a pecuniary matter in dispute measurable by some sum or value, though not restricted in amount."

In this case there was involved the construction of section 8 of the act of February 9, 1893, establishing the Court of Appeals of the District of Columbia, and in discussing the effect of that section the court said:

> "We regard this section and the act of 1885 as the same, in their meaning and legal effect. The act of 1885 prohibits appeals or writs of error, unless the matter in dispute exceeds the sum of $5,000, and provides that the restriction shall not apply to certain enumerated cases, 'but that in all such cases an appeal or writ of error shall be brought without regard to the sum or value in dispute.'
>
> "The act of 1893 allows appeals or writs of error whenever the matter in dispute exceeds the sum of $5,000, and also in cases 'without regard to the sum or value of the matter in dispute,' wherein the validity of any patent or copyright or of a treaty or statute of or an authority exercised under the United States is drawn in question, being the same cases mentioned in the second section of the act of 1885. We think as that section clearly applied to cases where there was a pecuniary matter in dispute, measurable by some sum or value, as has been repeatedly decided, the last clause of section eight of the act of 1893 must receive the same construction. The meaning of both statutes is that in the cases enumerated the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases."

The rule that this court has no jurisdiction to review judgments of the supreme courts of the Territories under the second section of the act of March 3, 1885, unless there is in controversy some sum of money or matter the value of which may be estimated in money, excludes alike judgments in criminal and civil cases, unless they fall outside the rule laid down in Chapman *vs.* United States, *supra*, thus:

In Cross *vs.* Burke, 146 U. S., 82, a civil proceeding, this court held it was without jurisdiction to review a judgment rendered in a *habeas corpus* proceeding, saying: "In order to give this court jurisdiction under the act of March 3, 1885, the matter in dispute must be money or some right the value of which in money can be calculated and ascertained. And as in this case the matter in dispute has no money value, the result is that no appeal lies."

And in Perrine *vs.* Slack, 164 U. S., 452, in a civil action involving a controversy as to the custody of two children, this court followed the rule laid down in Chapman *vs.* United States, 164 U. S., 452, saying: "We are of opinion that the writ of error will not lie. The controversy is between the mother and the testamentary guardian of the infant children, each claiming the right to their custody and care, and the matter in dispute is of such a nature as to be incapable of being reduced to any pecuniary standard of value."

It seems, therefore, to be incontrovertible that there is not drawn in question in this action the validity of a statute of or authority exercised under the United States, and as the matter in dispute is incapable of being reduced to any pecuniary standard of value the appeal herein should be dismissed.

II.

THE MERITS.

In respect to the merits of the case the only question involved is whether sections 3 and 4 of the act of March 19, 1901, are valid.

In regard to this question the trial court and the supreme court of New Mexico held that they are. There, as here, the relators assailed them upon the ground that they are obnoxious to the last clause of section 1 of the fourteenth amendment to the Constitution, in that they discriminate between different classes of citizens; and that they are in conflict with the commerce clauses of the Constitution.

POINTS AND ARGUMENT.

The inquiry of the court in determining the validity of the legislation asserted to be invalid by appellants is limited to the question of *power* in the legislature to pass it. The inquiry does not extend to matters of expediency.

Congress in organizing the Territory of New Mexico enacted that the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

Sec. 1851, R. S. U. S.

It thereby necessarily vested the legislature with the police and taxing power of the Territory, and the Territory has by this grant of power the unrestrained right to exercise either its police or its taxing power to the same extent that a sovereign State may exercise those powers.

Walker *vs.* Southern Pac. R. R. Co., 165 U. S., 593.

Appellants challenge the legislature's power to enact the provisions of law under discussion upon the ground that they conflict with the Federal Constitution.

In the case at bar the limitations of the Federal Constitution upon the legislative power of the Territory which need at all be considered in this connection are the two contained in the third clause of section 8 and the second clause of section 10 of article 1 of the Constitution, providing respectively that

> "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes," and
>
> "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be necessary for executing its inspection laws," etc.

The consideration of the provisions of sections 3 and 4 of chapter 45, *supra*, presents two general propositions, under either of which the power of the legislature to enact them is vindicated.

1. The power of the Territory under the law is exercised upon the hides before they have become interstate commerce, and the validity of the act is sustained upon the broad principle that it was enacted by the Territory in the rightful exercise of its police power.

2. If the hides in question should be considered "interstate commerce," at the time the law acts upon them, still the act is not in collision with the commerce clause of the Constitution and is valid, it being a legitimate inspection law enacted in the rightful exercise of the Territory's police power.

We will consider these propositions separately.

The supreme court of New Mexico, it seems from its opinion, rejected the proposition that the hides in question were not interstate commerce at the time the New Mexico statute operated upon them and required their inspection, but upheld the validity of the statute upon the theory that the statute complained of was a valid inspection law, notwithstanding it operated upon interstate commerce.

Clearly, the act is an inspection law. Why? For the sole reason that in its enforcement it requires inspection of personal property or the examination thereof.

Inspection laws, all of which are properly referred to the police power of a State, may be grouped under two heads:

(*a*.) Such laws as require in their enforcement the inspection or examination of personal property before it is interstate commerce.

(*b.*) Such laws as require in their enforcement the inspection or examination of personal property at a period when such property *is* interstate commerce.

The New Mexico statute necessarily falls under the one or the other of these two heads, and may be valid under either.

All inspection laws, which operate upon personal property at a period when such property is not interstate commerce or not foreign commerce, as a matter of course do not come in collision with the commerce clauses of the Federal Constitution.

As this court observed, in the case of Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 345–'57 :

> "Whenever inspection laws act on the subject *before* it becomes an article of commerce, they are *confessedly* valid, and also when, although operating on articles brought from one State into another they provide for inspection in the exercise of that power of self-protection commonly called the police power."

It is our purpose in this discussion to show conclusively that the power of the Territory under the law is exerted upon the hides before they have become interstate commerce, and the law which requires their inspection is therefore "*confessedly valid.*"

The act complained of is a part of that mass of legislation under which the cattle sanitary board of New Mexico was organized, and is a portion of the law regulating the animal industry in New Mexico. This legislation has, together with those provisions, for its object the protection of the cattle industry of New Mexico against destruction by either disease or theft.

The peculiar exposure of this species of property to depredation has called forth repeated legislative efforts to provide such police regulations as would be adequate to its protection, and these regulations assume that in regard to cattle

which are so easily taken possession of on our boundless plains, the police protection afforded ordinary chattels is insufficient. Thus the owner is required to brand his cattle so that they may be identified. Young cattle may not be kept in enclosures, but are required to be left to run at large with their mothers.

The title in them can only be alienated by a written bill of sale, and the owner must submit them to inspection by officers of the cattle sanitary board.

These are only some of the police regulations made by the Territory for the protection of this industry. Sections 3 and 4 of chapter 45, *supra*, are ancillary to and *in pari materia* with other sections of the law relating to the duties of the cattle sanitary board.

In considering the validity of this act it must be construed together with all the other acts which it modifies, qualifies, and has relation to. It will be seen by reference to the various acts relating to the cattle sanitary board that the legislature confided to that board not only the health of cattle, but also their protection against theft and depredation.

Sections 3 and 4 of chapter 45, *supra*, have immediate reference to sections 84, 85, 86, 87, 89, 90, 91, 182, 207, 208, 209, 210, 211, 213, 215, and 218 of the Compiled Laws of the Territory of New Mexico for the year A. D. 1897, and chapter 44, Session Acts of the Territory of New Mexico for the year 1899. This is manifest, when these separate provisions are collated thus:

> "A sanitary board, consisting of five persons, each of whom shall be a practical raiser and owner of neat cattle in this Territory, one to be appointed in and for each of the following districts: District number one, to be formed by the counties of Santa Fé, San Miguel and Taos; district number two, of the counties of Bernalillo, Valencia, Rio Arriba and San Juan; district number three, of the counties of Mora, Colfax and Union; district number four, of the counties of

Dona Ana, Grant, Socorro and Sierra; district number five, of the counties of Lincoln, Chavez, Eddy and Guadalupe. The limits of each as now constituted, hereby is created, to be known as the Cattle Sanitary Board of New Mexico."

Section 182, C. L. 1897.

"In the exercise of the powers and performance of the duties conferred and prescribed by this act, the said sanitary board shall and may make all necessary rules and regulations respecting the inspection of cattle intended for shipment or to be driven beyond the limits of this Territory; and also respecting the inspection of hides and slaughter-houses, in this Territory, and for the government of all employees of said sanitary board."

Section 208, C. L. 1897.

"Every inspector employed by the sanitary board under the provisions of section 190, shall in addition to the duties prescribed by the said act, be an inspector of brands and ear-marks, and also an inspector of hides and slaughter-houses, under the provisions of this act, and it shall be the duty of some one of such inspectors to inspect the brands and ear-marks of all cattle transported or driven out of this Territory, and to make a sworn report to the secretary of said sanitary board of the result of such inspection at least once in every thirty days, and oftener, if in the opinion of the sanitary board, it shall be necessary to do so; every slaughter-house in this Territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such slaughter-houses shall be carefully compared with the records of such slaughter-houses and a report in writing, setting forth the number of cattle killed at any such slaughter-house since the last inspection (or since the passage of this act, as the case may be), the names of the persons from whom each of said cattle was bought, the brands and ear-marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughter-house, or any other person, of the provisions of an act, entitled

"An act for the protection of stock, and for other purposes," approved April 1st, 1884. For the purpose of making the inspection authorized by this act, inspectors employed by the said sanitary board shall have the right to enter in the day or night time, any slaughter-house or other place where cattle are killed, in this Territory, and to carefully examine the same, and all books and records required by law to be kept therein, and to compare the hides found therein with such records."

Section 213, C. L. 1897.

"Any person killing or causing to be killed any bovine cattle or sheep for his own use, or for the use of others, or for the purpose in whole or in part of sale or exchange, is hereby required to keep in his own possession, unchanged and unmutilated, and in condition to be easily inspected and examined, all hides and pelts of such bovine animals, including the ears, for the period of thirty days after the killing, and of sheep ten days after the killing, and shall at any time while such hides or pelts remain in his possession permit the same to be inspected and examined by any sheriff, deputy sheriff or constable, or by any board, or inspector, or other officer, authorized by law to inspect any hides and pelt or animals whether dead or alive."

Section 89, C. L. 1897.

" Every person before he shall set up and carry on the trade of a butcher or slaughterer of horned cattle in this Territory, shall file a bond, approved by the county commissioners, with the clerk of the county in which he desires to carry on the business, in a sum of not less than one thousand dollars nor more than five thousand dollars, running to the people of the Territory of New Mexico, conditioned, that he shall keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, with a description of the animal, including marks, brands, age, weight, and from whom purchased, and the date thereof, and to keep the hide and horns of such animal free to the inspection of all

persons for the period of thirty days after it is slaughtered."

Section 84, C. L. 1897.

"Every person who shall be found carrying on the business of butcher or slaughterer in this Territory without having filed the bond provided in the eighty-fourth section, shall be deemed guilty of a misdemeanor, and be fined in a sum not less than fifty, nor more than one hundred dollars, for every day he shall carry on such business, to be recovered before any justice of the peace of the proper county or by indictment in the district court."

Section 85, C. L. 1897.

"Every person who shall carry on the business of a butcher or slaughterer of horned cattle, and shall fail to keep a true and faithful record, in a book kept for the purpose, of all cattle purchased or slaughtered by him, together with a description of each animal, including marks, brands, age, weight, and from whom purchased, and the date thereof, or fail to keep the hide and horns of such animal or animals for thirty days after such animal is slaughtered, shall be deemed guilty of a misdemeanor, and for each offense fined in a sum not less than ten nor more than one hundred dollars, to be recovered as provided in the preceding section."

Section 86, C. L. 1897.

"The record provided for in this act shall be open to the inspection of all persons, and also the hide and horns, for the period of thirty days, and any butcher or slaughterer refusing to permit such inspection or examination shall be subject to a fine of not less than ten nor more than twenty-five dollars, for each offense, to be recovered as provided in the preceding sections."

Section 87, C. L. 1897.

"Each violation of the provisions of this act shall be punished, in the discretion of the court in which a conviction is had, by a fine of not less than twenty-

five, nor more than one hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

Section 90, C. L. 1897.

"Inability or refusal to show such hide or pelt to any proper authority within said period of thirty days, or a refusal to so show it at any time thereafter while remaining in the possession of the person by or for whom the animal was killed, shall be *prima facie* evidence of a violation of the provisions of this act, and shall be competent evidence to go to the jury upon the trial of any indictment against such person or persons for the larceny of any animal or animals, or for the receiving of stolen property."

Section 91, C. L. 1897.

"That in addition to the powers and duties now conferred and prescribed by law to be exercised and performed by the sanitary board created by an act of the Legislative Assembly of the Territory, entitled,—'An act to prevent the introduction of diseased cattle into New Mexico,' which became a law on the 28th day of February, 1889, the said sanitary board shall have and exercise the powers and shall perform the duties prescribed by this act."

Section 207, C. L. 1897.

"It shall be the duty of said sanitary board to cause to be inspected the brands of ear-marks upon the cattle shipped or driven out of this Territory, and to cause to be kept and preserved a true and correct record of the result of such inspections, in the office of the secretary of said sanitary board, which record shall set forth the date of the inspection, the place where, and the person by whom made, the name and post-office addresses of the owner, shipper or claimant of the cattle so inspected, and the names and post-office addresses of all persons in charge of such cattle at the time of the inspection, the destination of such cattle, as well as a list of all brands and ear-marks upon the cattle so inspected, and the number and classification of such cattle."

Section 209, C. L. 1897.

"It shall be the duty of every person shipping or driving any cattle out of this Territory to hold the same at some convenient place for inspection, as provided by this act, and it shall be unlawful for any person to ship, drive or in any manner remove beyond the boundaries of this Territory, any herd or band of cattle, until they shall have been inspected as provided by this act."

Section 210, C. L. 1897.

"It shall be unlawful for any railroad company to receive any herd or band of cattle for transportation to a point beyond the boundaries of this Territory until the same shall have been inspected, as required by this act, and until such railroad company shall have been furnished with a certificate by a duly authorized inspector, showing that the brands and ear-marks upon such cattle have been duly inspected as required by this act, and any railroad company or any officer, agent or servant of a railroad company, who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars and not more than five thousand dollars, in the discretion of the court."

Section 211, C. L. 1897, Re-enacted by laws of 1899, Chap. 53.

"The records required to be kept by the secretary of the said sanitary board shall be kept in a well bound book, to be provided by the board for that purpose, and a certified copy of any such record under the hand and seal of the secretary of said board shall be *prima facie* evidence in all courts of this Territory of the truth of any fact required to be recorded therein by this act."

Section 215, C. L. 1897.

"The salaries of all employees and all other expenses incurred by the said sanitary board shall be paid as now provided by law, except that in addition to moneys hereafter to be raised by taxation, all sur-

plus moneys now in the treasury arising from the special tax known as the cattle indemnity fund, shall be available for that purpose."

Section 218, C. L. 1897.

CHAPTER XLIV.

An act for the protection of stock raisers, and to prevent the sale of dressed meats from animals that have been stolen in the Territory of New Mexico. S. H. B. 67. Approved March 15, 1899.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. That hereafter persons engaged in the business of butchers, or of buying and selling dressed meats in the Territory of New Mexico, shall not after the passage of this act buy from any person or persons, any dressed beef, or the carcasses or portions thereof of any sheep or goat, unless the person offering such meats or any of them for sale, shall at the same time exhibit to said butcher or dealer in such meats, the hide or hides of the animal or animals from which said meat was taken, and until such butcher or dealer in dressed meats shall have entered in a book, to be kept by him for that purpose, a full and complete description of such hides, giving the ear-marks, brands of each hide so exhibited separately, and also the color, character and age of the animal, from which each of such hides was taken, as nearly as possible, at the time.

SEC. 2. That the record of marks and brands and description of hides of animals, the meat of which is purchased by butchers or dealers in fresh meats, as provided for in section one of this act, shall be preserved by him, and at all times kept in a convenient place for the inspection of the inspectors appointed by the sanitary board, of cattle owners and of any other persons who may be interested in such hides, or the animals from which the same were taken, and to the officers of the law: Provided, any person selling or offering for sale any fresh meats as described in this bill the same having been killed within the Territory, shall produce at the time of said sale or

offer for sale is made, the hides of the animal or animals, the meat of which he sells or offers to sell; And provided further, that any person in this Territory having in his possession any meat or meats from animals killed in the Territory, shall display, upon demand of any inspector, peace officer or citizens, the hide or hides of such animal or animals, the meat of which he may have in his possession.

This proviso shall not apply to nor be in force against persons who may have purchased meat from any person or persons who have displayed to the purchaser the hide or hides of the animal or animals from which said meat was taken.

SEC. 3. That any butcher or dealer in dressed meats in the Territory of New Mexico, either at wholesale or retail who shall purchase the carcasses of any cattle, sheep or goats, or shall buy any portion of the carcasses of any such animal or animals, without having first inspected the hide or hides of such animal and making the record of the marks and brands of such sheep or goats, if any, and without having made the record, the marks, brands, color and character of each hide as hereinbefore provided, shall be deemed to be guilty of a felony, and upon conviction thereof, in any of the courts of this Territory, having jurisdiction of such cause shall be fined in any sum not less than twenty-five dollars, nor more than one thousand dollars, or by imprisonment for a term not less than six months nor more than three years, or both in the discretion of the court trying said cause; Provided, that this act shall in no wise apply to dressed meats of any and all kinds which may or shall be shipped into this Territory from any other State or Territory, nor to meats purchased by one dealer from another authorized butcher or dealer in dressed meats, who has complied with the requirements of this act and with the laws now in force relating to butchers.

SEC. 4. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in full force and effect from and after its passage.

"Any butcher or other person engaged in the slaughter of neat cattle who shall kill or cause to be killed any unmarked or unbranded cattle for market, or shall purchase and kill or cause to be killed neat cattle without having taken from the person selling the same a bill of sale or transfer in writing, duly acknowledged by the vendor before an officer authorized by law to take acknowledgments, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than two hundred dollars; Provided, that nothin in this section shall apply to the slaughter of any animal owned and raised by the person slaughtering the same."

Section 125, C. L. 1897.

"Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company or other common carrier to receive, for the purpose of shipment or transportatation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the cattle sanitary board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of purchaser and shipper of the hides, as well as the brands thereon, which said report shall be preserved by the secretary as a part of the records of his office."

"Any person, firm or corporation, common carrier, railroad company, or agent thereof, violating any of the provisions of this act, or refusing to permit the inspection of any hides as herein provided, shall upon conviction thereof be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

Sections 3 and 4, Chapter 45 Laws of 1901.

It will also be seen by a reference to those acts that the New Mexico legislature has also provided for the inspection of live bovine cattle before they may be removed from the exterior limits of the Territory. The object of this inspection is not for the purpose of determining whether healthy or unhealthy cattle are being transported from New Mexico, but the object is to prevent the shipper from shipping cattle from the Territory which belong to other cattle owners.

This court will recognize that for years the principal industry in great stretches of the West has been that of stock raising. The numberless large herds of that region necessarily require large areas of grazing lands in their maintenance, and have always been and must yet be allowed to range at large upon the great public domain, both because an individual ownership in any case of a body of lands sufficient in area to afford sustenance for the average herd is impracticable, and, on the other hand, the enclosure of any public lands by fences is prohibited and penalized by statute. And as was said by this court in Buford *vs.* Houts, 133 U. S., 320:

> "There is an implied license growing out of the custom of nearly one hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of the Government forbids their use."

These herds range unattended and at will for many months each year seeking their natural food, and often travel upon their quest several hundred miles, intermingling with cattle of others, until they are periodically "rounded up," separated, and returned to the ranches of their respective owners or other convenient points *for shipment.* For the purposes of identification each owner in the stock-raising States and Territories brands his range stock with a dis-

tinctive brand or device, which is by law required to be duly registered after its inspection and approval by an authorized board or officer, the object of which requirement is obvious, and to place one's brand upon a calf or maverick the property of another is made a felony. It is likewise made punishable to destroy the hide of an animal slaughtered and exposed for sale, it being required that the hide be exhibited or held for a period subject to inspection, in order that by the brand the original ownership of the animal may be determined and the regularity of its purchase and slaughter may in any case be determined.

The brand on the animal is the first link in the chain of an abstract of title to any animal. The law provides that the animal may only be alienated by a written or printed bill of sale, the execution of which must be acknowledged before some person qualified to administer oaths. Under these provisions a cattle inspector can always determine the ownership of cattle offered for shipment to points beyond the limits of the Territory. And the honest shipper may also at all times detect, by examining the brand, whether an animal belonging to a different owner has become mingled with his cattle. The brand furnishes the only evidence of ownership; and ownership is proved in that way. In the more compactly settled communities of the Mississippi Valley and New England States, the owner identifies his animal by peculiar marks on the animal, or because it is the cow with the "crumpled horn." On the vast ranges of the western States and Territories, the owner identifies them only because they bear his recorded brand.

As will be seen from a reference to the provisions of the New Mexico statutes, common carriers are prohibited from moving any cattle to points beyond the limits of the Territory until the same have been inspected, and until the railroad company has been furnished a certificate of a duly authorized cattle inspector, showing that the brands and earmarks upon such cattle have been duly inspected.

The cattle roam at large, hundreds of miles from the abode of their owner, and a dishonest shipper might include with his shipment many cattle belonging to other cattle-raisers but for the provision that all such cattle before they may be removed, either by being driven on foot or moved by means of railroad transportation, beyond the boundaries of the Territory must first be subjected to inspection.

The act complained of requiring the inspection of hides is but another provision having for its purpose the protection of the animal industry. The inspector examining the hides and tagging them is required by the act to "keep a complete record of all inspections made by him, and shall at once forward to the secretary of the cattle sanitary board, on blanks furnished by him for that purpose, a complete report of each inspection, giving the names of purchasers and shipper of the hides, as well as the brands thereon, which said report shall be preserved by the secretary."

If the cattle-owner has lost cattle by theft the tracing of the hide from one hide merchant to another in the Territory by ascertaining the person in whose custody the hide was last found is often the only means afforded for detecting and punishing the guilty cattle-rustler.

The local butcher is generally the market selected by the "rustler" for disposing of his stolen cattle.

Section 84, C. L. 1897, and chapter 44, Session Laws of 1899, *supra*, provide that all butchers shall keep a record of live cattle or carcasses of cattle purchased by them, showing the brands and ear-marks of all cattle so purchased and the names of persons from whom the purchases have been made. The inspector may in most cases trace a hide about to be shipped from the Territory back to the butcher who purchased the animal and in that way secure evidence for the conviction of the cattle thief; and these various provisions relating to the inspection of hides and the keeping of records of brands and ear-marks is often the only avenue left open to owners of cattle through which they may bring cattle

thieves to justice and stop depredations upon the cattle industry.

It seems plain, considering all these various enactments, that sections 3 and 4 of chapter 45, *supra*, contain provisions which prepare and fit these hides for articles of interstate commerce, by requiring that before they become such articles they must first leave with the sanitary board a record of their history and previous ownerships.

There is complete analogy between the case at bar and the case of Turner *vs.* Maryland, 107 U. S., 38. That case in our opinion enunciates the principle which should be applied to the case at bar.

An analysis of that case discloses the following facts and announces the principles of law which operate upon such facts.

The statute, the validity of which was challenged in the Supreme Court of the United States, provided:

> "After the passage of this act, it shall not be *lawful to carry out of this State*, in hogshead, any tobacco raised in this State, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of this act," etc. * * * "and any person violating any of the provisions of this section shall forfeit and pay the sum of three hundred dollars * * *; provided, that nothing herein contained shall be construed to prohibit any grower of tobacco or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco * * * and *shall be liable* to the same charge of outage and storage as in other cases."

Other sections of the Maryland law provided for the appointment of tobacco inspectors, prescribed their duties and enumerated the data which should be ascertained and preserved by them and fixed the charge for outage (the inspection fee) at two dollars for every hogshead not exceeding one thousand one hundred pounds, etc.

The violation of this statute, like the New Mexico statute, subjected the offender to a criminal prosecution.

The plaintiff in error, Turner, was indicted for having violated this statute.

The indictment alleged that he packed in a hogshead, tobacco grown by him on a farm belonging to him in Charles county, in Maryland * * * and shipped it to Baltimore * * * that it was not weighed, marked, or passed by any inspector * * * but that the said Turner had exported it from said city to Bremen, in Germany, without procuring it to be weighed, passed, or marked by any such inspector, and further averred that the said Turner did not, prior to said exportation, pay or cause to be paid any sum of money *due for outage* to any inspector, etc.

Turner was convicted by the Maryland court, and upon a review of the judgment of the Maryland court contended that both the commerce clause of the constitution and the clause prohibiting the levying of duties or imposts upon exports had been violated by the Maryland statute, and his conviction under that statute.

It is manifest that the Maryland statute only operated on tobacco *raised in the State and packed in hogsheads* and otherwise prepared for shipment out of the State, either to some other State or to some foreign country.

The Maryland statute contained every provision which opposing counsel claim the New Mexico statute should be construed to contain. Opposing counsel make the claim that the New Mexico statute operates upon hides which are intended for shipment or exportation and upon no other hides.

The Maryland statute confessed by its direct and express terms to operate only upon tobacco prepared and packed for shipment and exportation out of the State.

The court, in sustaining the conviction of Turner by the Maryland court and upholding the validity of the Mary-

land act, found that the Maryland law did not operate upon *articles of interstate commerce*, and among other things said:

> "The legislature of the State of Maryland from the earliest history of the colony and since the formation of the State government has made the inspection of tobacco raised in that State compulsory. That inspection has included many features and has extended to the form, size and weight of the packages containing the tobacco as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State is a legitimate part of the inspection laws and means prescribed therefor in the statutes in question naturally conduce to that end. Such provisions as parts of inspection laws are as proper as provisions for inspecting quality and it cannot be said that the absence of the latter provisions in respect to any particular class of tobacco necessarily causes the laws containing the former provisions to cease to be inspection laws. * * * The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, *containing the tobacco for exportation*, and for becoming an article of *foreign commerce or commerce among the States*, and ARE TO BE DONE BEFORE IT BECOMES SUCH AN ARTICLE."

And further on in the opinion the court said:

> "So, too, in the exercise of the same discretion and of its power to prescribe the method in which its products shall be fitted for exportation, it may direct that a certain product, while it remains in the bosom of the country and before it has become an article *of foreign commerce* or *of commerce between* the States, shall be encased in such a package, etc. * * * Such a law is an inspection law, and may be executed by imposing a tax or duty of inspection, which tax so far as it acts upon *articles for exportation* is an exception to the prohibition to the States, etc."

A careful reading of the case of Turner *vs.* Maryland, *supra*, discloses that the act did not pretend to operate upon tobacco sold in the State and which remained an article of domestic or local commerce, but by its express provisions only intended to operate on tobacco packed and prepared for interstate and foreign commerce.

Assuming that the New Mexico statute made the inspection of hides prepared for exportation and intended for that purpose compulsory and further assuming that the act did not operate upon any hides except such hides as were prepared and intended for exportation we would then have the exact state of facts that the Maryland statute, which was held valid, created. The principles enunciated in Turner *vs.* Maryland plainly demonstrates that the hides in question were neither interstate nor foreign commerce at the time the law operated upon them.

Turner *vs.* Maryland, *supra*, was cited approvingly in Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 345, in a cause wherein an inspection law fell under the second group of inspection laws, viz., those which operate upon interstate commerce.

It will thus be seen that the Supreme Court of the United States recognizes the two classes of inspection laws and the difference in the operation upon them of the constitutional provisions cited.

Opposing counsel contend that the act in question is not an inspection law. If it is, however, a law which does not relate to or operate upon interstate or foreign commerce it is then wholly immaterial whether it is or is not an inspection law. Mere terminology does not affect it. It is "*confessedly valid.*"

The act of 1901, by its provisions, does not require an inspection and the payment of a fee therefor by reason of the fact that the hide is to be shipped from the Territory. It requires the owner and holder of the hide to submit the hide to inspection and pay the charge therefor. It does not

require the common carrier nor the shipper to pay the inspection fee. It requires every person who kills cattle to keep the hide subject to inspection for a period of thirty days and prohibits the hides being taken from the Territory unless they have been inspected and tagged by an *inspector of the district wherein they originate.* This latter requirement plainly implies that the original owner or holder, who must be the slaughterer, is the person who is primarily liable for the fee. True, if he does not pay it, the fee still remains a lien upon the hide, which lien may be enforced against the hide or may be discharged by the purchaser or shipper paying the fee upon an inspection being made.

The shipper can at all times protect himself against pecuniary loss by refusing to traffic in hides which have not been inspected and by observing the provisions of the act instead of defying them.

It is apparent that the power of the Territory is exerted upon the hides before they become articles of interstate commerce, and is so exerted without reference to whether they ever become interstate commerce. The carrier is not required to pay the inspection fee because he hauls the hide, nor is the shipper taxed because he intends to transport it or is transporting it. They are respectively enjoined from taking it out of the Territory when it does not bear the proof of having been subjected to inspection and examination.

The true method of testing the validity of a law, when attacked as being an attempt to regulate commerce between the States, is to ascertain when the power of the State is exerted upon the article of commerce. If the power of the State is exercised upon the article before it becomes commerce, then the Constitution does not limit the State's power. Its power is only limited when it attempts to regulate commerce in the article when it is actually *in transitu* consigned to another State or has been consigned to a carrier for transportation.

There is a radical difference in this connection between an

article which may be the subject of commerce and interstate commerce in the article.

In the case at bar the power of the Territory is exerted upon the hide in the jurisdiction of the Territory before it has commenced to move.

It can not and does not become an article of commerce until it has been inspected and tagged, and until then both the shipper and the carrier are prohibited from taking the hide from the Territory.

The power of the State over products and legitimate articles of commerce from States *in transitu* to it is not commensurate with its powers over its own products, which may be used as articles of commerce to a sister State.

This court has in numerous cases differentiated between legislative acts operating upon interstate or foreign commerce, and such acts which act upon articles about to become interstate commerce; thus in Coe *vs.* Errol, 116 U. S., 517.

Justice Bradley, speaking for the court, aptly and succinctly differentiates between the power of a State, exerted upon its products while yet in the State, and the attempt to exert this power upon the product after it has become commerce "among the States." The facts in that case were that a resident of the State of Maine owned a large number of spruce logs that had been carried down the winter before from Wentworth's location in New Hampshire and placed in clear stream, and on the banks thereof, in the town of Errol, to be from there floated down the Androscoggin river to the State of Maine and manufactured and sold. While at Errol the selectmen of the town assessed the logs for taxation, and to escape this tax Coe contended that the logs were protected by the commerce clause of the Constitution.

In disposing of this case, the court said:

> "The question for us to consider therefore is, whether the products of a State (in this case timber

cut in the forest) are liable to be taxed like other property within the State, though intended for exportation to another State and partially prepared for that purpose by being deposited to a place of shipment, such products being owned by persons residing in another State * * * We recur then to a consideration of the question free from this limitation; are the products of a State, although intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

"Does the owner's state of mind in relation to the goods, that is, his intent to export them and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. This question does not present the predicament of goods in course of transportation through a State though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the supreme court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town, or station serving as an entreport for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination,

> or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State."

And in Diamond Match Company *vs.* Ontonagon, 188 U. S., 82, in a case wherein this court upheld the validity of a Michigan statute and a village ordinance enacted by virtue of the statute, under the authority of which certain logs about to be shipped from Ontonagon, Michigan, to Greenbay, in Wisconsin, were assessed for taxation, this court said:

> "Was the transit interstate commerce? We agree with counsel that it is unimportant in determining an answer whether the transit 'was by water or by railroad, or both water and railroad.' But no purpose to burden interstate commerce is evident in the statute, and the power of the State to tax everything which is part of what has been called 'the general property' or 'the general mass of property' of the State, is undoubted. But things which have been brought to a State may not have reached that condition. Things intended to be sent out of a State, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out—may be confused by circumstances, and the confident assignment of the property as subject or not subject to taxation is not easily made."

This court has also drawn a distinction between "articles manufactured for export or intended to be exported to another State, and interstate commerce in such articles," thus:

In Kidd *vs.* Pearson, 128 U. S., 1, in a case wherein the validity of a statute of the State of Iowa was sustained and held not to be in conflict with the commerce clause of the

Constitution, which prohibited the manufacture of intoxicating liquors *intended for transportation* to another State, this court said:

> "We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer *intends* to export the liquors when made? Does the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?
>
> "These questions are all well answered in the language of the court in the *License Tax Cases*, 5 Wall., 462, 470: 'Over this commerce and trade (the internal commerce and domestic trade of the State) Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States.'
>
> "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. The manufacture of intoxicating liquors in a State is none the less a business within that State, because the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other States.
>
> "This court has already decided that the fact that an article was manufactured for export to another State does not *of itself* make it an article of interstate commerce within the meaning of sec. 8, art. 1, of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

And in the same case observed:

> "The police power of a State is as broad and plenary as its taxing power, and property within the State is subject to the operation of the former so long as it is within the regulating restrictions of the latter."

This court has also directly distinguished between laws which act upon a product of the State while it is yet in the State, and products which are articles of interstate commerce coming into the State, thus—

In Turner *vs.* Maryland, *supra*, this court said:

> "In this case no inspection is involved except that on tobacco grown in Maryland, and we must not be understood as expressing any opinion as to any provision of the Maryland laws which refer to the inspection of tobacco grown out of Maryland."

And in Diamond Match Co. *vs.* Ontonagon, *supra*, this court said:

> "But things which have been brought to a State may not have reached that condition (the general mass of property of the State). Things intended to be sent out of a State, *but which have not left it* may not have ceased to be in that condition (the general mass of property of the State)."

The case of United States *vs.* Boyer, 85 Fed., 425, also furnishes an excellent exposition of this principle. In that case an act of Congress authorizing the Secretary of Agriculture to make regulations for the inspection of cattle, &c., slaughtered in Missouri, when the *products were intended for sale in other States and foreign countries*, was attempted to be maintained. After a thorough review of many of the decisions of the Supreme Court of the United States bearing upon that case, the regulations and the act of Congress were held void. The court excluded the Federal power on the ground that the products at the time when the Federal authority

was attempting to be exercised upon them were not interstate commerce.

That case conceded the Federal authority as paramount when dealing with interstate commerce, but excluded it when the product had not reached the domain of interstate commerce.

In the above-cited case Rogers, district judge, in reaching the conclusion he did, quoted the following language of Chief Justice Marshall in pronouncing the opinion of this court in the great case of Gibbons *vs.* Ogden, 9 Wheat., 1:

> "That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of the country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes. It must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given."

And the language of the present Chief Justice of this court in the case of U. S. *vs.* E. C. Knight Co., 156 U. S., 13, as follows:

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed; for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

The case of Cornell *vs.* Coyne, 192 U. S., 418, also enunciates the same principle for which we here contend. In that case the validity of an act of Congress was assailed which required, among other things, that "all sales or consignments made by manufacturers of filled cheese to wholesale dealers in filled cheese, or to *exporters* of filled cheese, shall be in original stamped packages."

> SEC. 9. "That upon all filled cheese which shall be assessed and collected a tax of one cent per pound to be paid by the manufacturer thereof." * * *

It appears from that case that the plaintiffs in error were manufacturers of filled cheese and entered into contracts for its manufacture and export, and under such contracts manufactured and exported 1,580,479 pounds of filled cheese. They were required by the defendant in error, revenue collector, to purchase and affix stamps to the exported packages of filled cheese. They protested against the required purchase and commenced an action for the recovery of the various sums which they alleged they were wrongfully required to pay for revenue stamps. In their declaration they alleged that section 9 of the act of Congress, and said act itself was repugnant to section 9 of article 1 of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State."

Mr. Justice Brewer, in pronouncing the opinion of this court upholding the validity of the act of Congress, said:

"Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export. While that which is asked in this case is the return of a manufacturing tax, there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the Government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation. Such has been the ruling of this court. In Turpin *v.* Burgess, 117 U.S., 504, 506, where the question was as to an export stamp tax on tobacco, Mr. Justice Bradley, speaking for the court, said:—

"The constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are,—'No tax or duty shall be laid on articles exported from any State.' Art. I. sec. 9, par. 5. In the other they are,—'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I. sec. 10. par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on

all property alike, and not levied on goods in course of exportation, nor because of their exportation, is not within the constitutional prohibition."

Other cases may be cited which illustrate this principle—thus in *In re* Greene, 52 Fed., 113, Mr. Jackson, circuit judge, in announcing the opinion of the court, said:

"That such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the State of its production or *situs* to some other State or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of property in the State of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State. At that time the power and regulating authority of the State ceases, and that of Congress attaches and continues, until it has reached another State, and become mingled with the general mass of property in the latter State. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution, and consumption thereof in the latter State forms no part of interstate commerce."

The State of New York, by law, prohibited the sale of veal from a calf under four weeks old when killed. By another provision required all veal shipped to have annexed thereto a tag stating the name of the person who raised the calf, the name of the shipper, the points of shipping, and the destination and age of the calf. In the case of People *vs.* Bishop, 94 N. Y. Supp., 774, the provision requiring the tagging of the veal was assailed as being invalid. The court in upholding its validity said:

> "This section does not prohibit the shipping or sale of veal. It merely requires that all veal that is shipped shall have annexed thereto a tag, stating the name of the person. * * * Many calves that are so shipped are over four weeks old. Such are a legitimate article of food; but many are under that age and therefore not a healthful food, nor a legitimate article of commerce for that purpose. * * * To meet this difficulty the section in question was passed. Its provisions are necessary and reasonable to complete the scheme which the legislature has devised to protect the public. * * * The purpose of its provisions is as clearly within the police power of the legislature as are the provisions of sec. 70*e* (preceding section). * * * Neither does the section violate article 1, of sec. 8, Cl. 3, of the Federal Constitution. True, the prohibition against shipping without a tag is broad enough to apply to veals intended to be shipped to another State, but that does not interfere with the regulation of commerce between the States. Hannibal & St. Joe R. R. Co. *vs.* Husen, 95 U. S., 465; Kidd *vs.* Pearson, 128 U. S., 1; People *vs.* Niagara Fruit Co., 77 N. Y. Supp., 805. Within the authority of those cases the exclusive right to regulate commerce, etc., secured to Congress by the Federal Constitution is not invaded."

In the case at bar the hides never could lawfully be delivered to or received by a common carrier for transportation without they furnish evidence by proper tagging of having been inspected. The common carrier rightfully re-

fused to receive them for transportation. They were not yet "fitted or prepared for articles of interstate commerce."

The mere act of a shipper baling his hides and in violation of law offering them to a common carrier for transportation, could in no wise constitute them articles of interstate commerce; if so, then it might equally be argued that when a shipper offers his cattle to a common carrier and perhaps other cattle commingled with his own, which he is attempting clandestinely to remove from the Territory, that such cattle have ceased to belong to the general mass of property of the Territory, and have at once become articles of interstate commerce and placed under the protection of the commerce clause of the Constitution and thereby rendered immune from territorial regulation. In the case of a cattle shipment yet another step is required before the cattle have been "prepared and fitted for articles of interstate commerce;" they must still be inspected so that it may be definitely ascertained that the shipper has not included cattle other than his own in the shipment. Until this last step is taken the cattle are still subject to the regulating restrictions of the Territory. So, too, in the case of the hides. The mere offering them for shipment can not withdraw them from the jurisdiction of the Territory. The hides still owe a duty to the Territory. Such of them as have not been previously examined and inspected must first be inspected and leave their history among the records of the sanitary board.

In Railroad Co. *vs.* Husen, 95 U. S., 465, this court held it to be "within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others, and that the police powers of a State justified the adoption of precautionary measures against social evils and the enactments of such laws as would have immediate connection with the protection of persons and property against the noxious acts of others."

The act in question is a legitimate exercise of the police power and is not dependent in any manner upon the excep-

tion contained in the article of the Constitution, which provides that States may levy imposts for the execution of their inspection laws. The inspection fee is not levied upon interstate commerce.

EVEN IF THE HIDES IN QUESTION SHOULD BE CONSIDERED INTERSTATE COMMERCE AT THE TIME THE LAW ACTS UPON THEM, STILL THE ACT IS NOT IN COLLISION WITH THE COMMERCE CLAUSE OF THE CONSTITUTION AND IS VALID, BEING A LEGITIMATE INSPECTION LAW.

Territory *ex Rel. vs.* D. & R. G. R. R. Co., 78 Pac., 75, and concurring separate opinion of Justice Pope, 79 Pacific Rep., 295.

Ever since the case of the City of New York *vs.* Miln, 11 Pet., 102, this court has held, and it has been universally conceded, that the right of inspection by a State existed as of one of its ordinary police powers, which it was at liberty to exercise quite irrespective of any Federal statute, for the protection of the health, comfort, and security of its citizens and the protection of the property of its citizens.

The power of the State to enact inspection laws, provided such laws are intended in good faith for the protection of the people, and not as a covert means for raising revenue by exhorbitant charges, is unquestioned.

See Justice Brown's opinion in Pabst Brewing Co. *vs.* Crenshaw, 198 U. S., 17–41.

The act here in question answers all the essential requirements of a valid inspection law in:

(*a*) That a necessity existed for its enactment, it being directed against a well-known and dangerous evil, namely, the theft and destruction of live stock upon the ranges, the raising and selling of which constitute the chief industry of the Territory and in many places the only industry.

(*b*) That it is not unreasonable in regard to the charges for inspection;

(*c*) That it intended and is well calculated to eradicate or at least lessen said evil;

(*d*) That it does no violence to the rights secured to the citizens of any other State or Territory;

(*e*) That it operates upon property and not upon persons;

(*f*) It can be executed without taking testimony or evidence.

The legislature and courts of New Mexico must be presumed to be perfectly familiar with conditions as they exist in New Mexico and understand the necessities of her people in regard to legislation designed to protect the property of her citizens. Whether such a law as the one now in question is necessary should be referred to the legislative department of the Territory. And the legislature having enacted it this court will hesitate to deny its validity.

As was said by this court in the case of Clark *vs.* Nash, 198 U. S., 361–65–69:

> "This court recognizes the difference of climate and soil which render necessary different laws in different sections of the country. * * * This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its courts, must in the nature of things be more familiar with such facts and with the necessities and occasion * * * than can any one be who is a stranger to the soil of the State and that such knowledge and familiarity must have their due weight with the State courts."

Counsel for appellants contended in the court below and again here repeat that the law in question is not a valid inspection law; that the evil it is aimed to cure is essentially different from the purposes for which other inspection laws coming before this court were enacted, and because it is in that respect novel. They insist that the object of inspection laws is to improve either the quality or appearance of articles intended for exportation and attempt to limit the scope

for which inspection laws may be lawfully enacted to such laws as affect the health of a community and such as go to improve the articles of commerce. In this behalf we submit that the power of a State in enacting legitimate inspection laws, which in a measure affect and operate upon interstate commerce, is as broad and plenary as is its police power, and that valid inspection laws, which operate upon articles of interstate commerce, are but the exercise of the police power of a State, and that the executing of an inspection law is but the exercise of police regulation by examination of personal property.

This court has never attempted to define nor limit the scope which legislation may take in enacting valid inspection laws. The Constitution itself nowhere defines them. Their extent and limitation can only be ascertained "by the gradual processes of judicial inclusion and exclusion as the cases presented for decision require."

The scope of inspection laws can no more be defined or limited than can the scope of police power of which it is a branch.

In State *ex rel.* Barton Co. *vs.* K. C., Ft. Scott and G. Ry. Co., 32 Fed., 722-23, Mr. Justice Brewer, then circuit judge, said:

> "We are confronted at the outset with the fact that no one knows the limits of the police power. Many attempts have been made to define it and prescribe its boundaries, but none have as yet been so successful as to meet with general approval."

And Justice Bradley, in speaking for the court in Voight *vs.* Wright, 141 U. S., 62-'5, expressly refused to limit their operation (inspection laws), remarking that the question was "still open as to the mode and extent in which inspection laws can constitutionally be applied to personal property imported from abroad or from another State."

But Justice Miller, in the slaughter-house cases (16 Wall., 36–62), said:

> "This power [police power] is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial one of property."

It extends, says another eminent judge, "to the protection of the lives, health, comfort and quiet of all persons and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the legislature to do this, no question ever was or upon acknowledged general principles ever can be made so far as natural persons can be concerned."

Opposing counsel also contend that the act in question performs no useful purpose, and in their brief, filed here, recite some five or six paragraphs of the original petition for the mandamus.

The allegations contained in the paragraphs are all argumentative, and go to the expediency rather than the validity of the law. They contain considerations which might well have been urged before a legislative committee, but can have no weight in a judicial proceeding where the court's inquiry is limited to the sole question of power in the legislature to enact the law.

They also complain that inasmuch as the law fails to provide for the seizing of a spurious hide by the inspector, that the hide and all evidence it contains are removed from the Territory, and the inspection is therefore a vain thing.

They entirely lose sight of the fact that the inspector is by the law required to make a record of the brands and ear-

marks upon the hide, and then forward the result of his inspection to the secretary of the board.

And further lose sight of the fact that by section 215, C. L. 1897, it is provided that the records required to be kept by the secretary of the board shall be by him kept in a well-bound book, and a certified copy of such record shall be *prima facie* evidence in all courts of the Territory of the truth of any fact required to be recorded therein.

The data which the hide itself could prove having been preserved and in such a way that use may be made thereof in courts of justice, dispenses with the necessity of keeping the hide itself within the jurisdiction of the Territory.

As we have before suggested the New Mexico legislature, entirely familiar with conditions as they exist there, legislated with the knowledge before them that New Mexico contained no tanneries, that all hides originating in New Mexico, which were not by cattle thieves or otherwise destroyed, would sooner or later find their way through the channels of local commerce to Santa Fé, Albuquerque, or Las Vegas, the principal commercial centers of New Mexico, and would from those points be sent beyond the confines of the Territory. For that reason most of the hides are inspected at those centers, while also a large number are inspected and tagged at other points in the Territory. And there being no local consumption of hides the legislature safely concluded that a law which prohibited a hide being moved from the Territory without its having been inspected and tagged would insure a record of practically all hides originating there being preserved among the archives of the board.

One illustration will at once demonstrate the usefulness of this law.

The butcher-shop and slaughter-house are required to keep a record of the names of all persons from whom cattle are purchased. If "A" sells 10 head of cattle to the butcher, the butcher records the fact, and also records the fact that the ten head of cattle were branded — T + (bar T cross).

This fact is now preserved. The hides of these cattle are kept by the butcher for thirty days, and are within that time almost certain to be tagged and inspected and the result of the inspection forwarded to the board. If not then inspected they are inspected in the warehouse of the hide merchant who intends shipping them from the Territory. The sanitary board then has the fact that ten hides branded — T + were shipped from the warehouse of the hide merchant on a given date to a point beyond the limits of the Territory. Afterwards, it transpires that the owner of the — T + brand becomes aware of the fact that he has lost ten head of his animals. He at once goes to the office of the secretary of the board, and in going over his records ascertains that a hide merchant at Santa Fé had ten hides bearing the brand — T +. The owner is at once put on the correct trail. He goes to the hide merchant, asks from whom he purchased these ten hides. The hide merchant may or may not know. He, however does, know the names of the butchers or slaughterers from whom he purchased hides he is about to export. The owner, or an officer of the law, is given the names of those butchers, some fifteen or twenty, and then each butcher submits the record of the names of persons from whom he purchased, and the brands on the animal purchased, and the cattle thief is soon run to earth.

The very fact that this law exists on the statute books acts as a deterrent to the commission of theft. The person premeditating the stealing of cattle is at once confronted with the knowledge that a complete police system requires the butcher, his only market, to keep a record of his name, as well as a description of the animal he sells.

Opposing counsel insist that inspection of articles of commerce cannot be resorted to for the prevention or detection of crime. But in Railroad Co. *vs.* Husen, 95 U. S., 465–71, this court said:

> "It may also be admitted that the police powers of a State justifies the adoption of precautionary measures

> against social evils. Under it a State may legislate to prevent the spread of crime or pauperism or disturbance of the peace. * * * All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons or such a use of property as is injurious to the property of others. They are self-defensive."

Even the most perfect legal machinery cannot avail to insure complete security of property in live animals. The stock thief or "rustler" takes care to commit his depredations in the seclusion of the prairies or the hills, generally and practically secure against conviction in a judicial forum upon evidence of eye-witnesses. To this end the law in question, together with the other provisions which it re-enforces, is directed, providing an additional safeguard against the wanton destruction of cattle in so far as that can be accomplished by diminishing the facilities which would otherwise be afforded the depredator for the convenient removal, beyond the range of detection and at a profit to himself, of the tell-tale hides.

Let these reasonable and salutary restrictions be removed then the slaughter-houses and butcher-shops will furnish a convenient "fence" for the cattle "rustler," and stolen animals will displace the animal of the honest stock raiser in the markets of New Mexico.

In the case at bar the hides were attempted to be consigned to Denver, in the State of Colorado, and consequently could not have been foreign commerce.

It is true that Brown *vs.* Maryland, 12 Wheat., 419, contains dicta to the effect that this provision applies also to the commerce between the States. This dicta was, however, expressly overruled in Woodruff *vs.* Parham, 8 Wall, 123, the court saying:

> "The term 'import' as used in that clause of the Constitution which says that no State shall levy any

> imposts or duties on imports, or exports, does not refer to the articles imported from one State into another, but only to the articles imported from foreign countries into the United States."

It has, however, been decided that, upon principle, the States have a right to make inspection laws which operate upon interstate commerce.

Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 261.

Counsel cite the case of People *vs.* Compagnie General Trans-atlantique, 107 U. S., 62, and rely upon it as authority against the validity of this act and quote the following from that case:

> "A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law within the meaning of that word by calling it so in the title."

That case, however, cannot be urged as authority against the validity of the act in question. In the case cited the State attempted to exert its power not upon articles of commerce but upon human beings coming from a foreign country. In that case the court said:

> "Inspection laws and the words imports and exports, as used in article 1, sec. 10, clause 2 of the Constitution, have reference to property and not to persons, and can have no reference to free human beings."

It will also be observed that in that case the law did not operate upon property or persons of the State, but upon persons before coming into the State.

In Neilson *vs.* Garza, 2 Woods, 287, a statute of the State of Texas requiring the inspection of all hides imported and exported from and into the State of Texas was upheld by the circuit court of the United States in an exhaustive opin-

ion by Mr. Justice Bradley of the Supreme Court of the United States.

In that case it was contended that the law was void both because it attempted to regulate commerce between the States and because it attempted to lay duties on exports and imports.

In disposing of the case Justice Bradley said:

> "Now, the law in question is a general law of the State of Texas; it purports to be an inspection law, to encourage stock raising and to protect stock raisers; it makes each county of the State, except certain counties named, an inspector's district, for the inspection of hides and animals; and creates the office of inspector to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of record of his inspections; it requires him to examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the country for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspection, branding and reporting animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brand cannot be ascertained, unless identified by proof; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the act. By the 16th section of the act it is provided that any person may ship from any part of the State any hides or animals imported into the State from Mexico, and shall not be required to have the same inspected; provided, he has first obtained the certificate of the inspector or deputy inspector of the county into which the same were imported, certifying the date of the importation thereof, the name of the importer and of the owner, and of the person in charge of the same, the name of the place where the same were imported together with the number of hides and animals so imported and the description of their marks and brands (if any there be) by which the same may be identified. By the

17th section it is declared that inspectors shall be allowed to charge and collect the same fees for the services which they are authorized to perform by the terms of section 16 as are allowed in other cases thereafter provided. The fees referred to are those allowed for inspection, which are, as before stated, from 6 to 10 cents per hide according to the number inspected.

"Now, it is contended that the examination and certificate required by the 16th section, in order to be allowed to export out of the State hides imported from Mexico, is not an inspection, but is expressly denominated otherwise. 'Shall not be required to have the same inspected' are the words, it is true. But the thing which is required, though not such an inspection as is usual and customary in other cases, is, nevertheless, an actual inspection. The exporter must obtain the certificate of the inspector, or his deputy, of the country into which the hides were imported, certifying (note what things are to be certified) the date of the importation, the name of the importer, and of the owner, and of the person in charge, name of the place where imported, number of hides and animals imported and description of their marks and brands, if any there be, by which they can be identified. What is this but inspection? The object is to subject the hides or animals to the examination of the official inspector that he may note everything about them, serving to their identification, ownership, etc."

"I do not say that such an inspection as this is necessary or expedient; but it is inspection; and at such a place as Brownsville, it may, for aught I know, be a necessary police regulation to prevent fraud and clandestine removal and exportation of property belonging to the people of Texas."

In Patapsco Guano Co. *vs.* North Carolina, 171 U. S., 345, *supra*, the Supreme Court upheld as valid a law of the State of North Carolina which required the inspection of commercial fertilizers and the payment of an inspection fee. After quoting approvingly from the opinion in Nielson *vs.* Garza, *supra*, the court said:

> "Whenever inspection laws act upon the subject before it becomes an article of commerce, they are confessedly valid. And also, when, although operating upon articles brought from one State into another, they provide for inspection in the exercise of that power of self protection commonly called the police power."

This case disposes of every question raised against the validity of the act. In that case the inspection of fertilizers was confided to the Department of Agriculture, and section 2190 enacted:

> "For the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing materials, in this State, there shall be a charge of 25 cents per ton on such fertilizers and fertilizing materials for each fiscal year ending November 30th, which shall be paid before delivery to agents, dealers, or consumers in this State. * * * Each bag, barrel or other package of such fertilizers or fertilizing materials shall have attached thereto a tag stating that all charges specified in this section have been paid. * * * Any person, corporation or company who shall violate this chapter, or who shall sell or offer for sale any such fertilizers, contrary to the provisions above set forth, shall be guilty of a misdemeanor." * * *

The North Carolina act also provided that the Agricultural Department should employ an analyst, who should inspect the fertilizers. His salary was to be paid out of the funds of the Department of Agriculture.

The complete analogy between the North Carolina statute and the New Mexico statute is at once apparent. The North Carolina statute did not appropriate all of the inspection charge to the payment of the inspector's salary, but required the inspection charge to be paid to the Department of Agriculture, and the inspector is paid a salary out of that fund for his services. The New Mexico statute likewise does not

appropriate all of the funds derived from the inspection of hides to the payment of the salary of the hide inspector, but requires it to be paid into the "cattle indemnity fund," and the inspector is paid out of that fund.

Counsel for appellant labor under the fallacy that the cattle inspector performs all the labor that is required regarding the inspection of hides. This is a mistaken view of the law. The inspection of hides is confided by the Territory to the Cattle Sanitary Board, and the money derived from inspection charges is appropriated by the Territory to the payment of the expenses of that board.

The reasonableness of the fee charged for inspection is a matter for the determination of the legislature.

Neilson *vs.* Garza, *supra.*

Patapsco Guano Co. *vs.* North Carolina, *supra.*

Turner *vs.* Maryland, *supra.*

The court cannot inquire whether the inspection fee is excessive. It can only inquire as to whether or not the fee is used for defraying the expenses of the inspection and is not appropriated to some other purpose and thereby made a means for securing revenue. This the act does not do. It requires the inspection to be made by the cattle sanitary board and the inspection fee is paid to it.

In Arizona the law requires the inspection of hides as in New Mexico (sec. 39, act No. 6, Laws of Arizona, 1897). In the case of Phœnix Wholesale Meat Company *vs.* Moss, 64 Pac., 442, an appeal pending before that court from a judgment of the district court awarding judgment in favor of a cattle inspector for services rendered in inspecting hides, was dismissed for want of jurisdiction in the court hearing it by reason of the jurisdictional amount being insufficient. The act, although open to every objection which can be urged against the validity of the New Mexico act, was upheld and its provisions enforced by the district court of

Maricopa county, and the supreme court in dismissing the appeal observed:

> "The plaintiff's recovery was in the nature of fees or compensation allowed to him as a public officer for the performance of a duty required by law. The statute which imposes upon the live stock inspector that duty also provides that he shall receive as compensation therefor the sum of twenty-five cents for each hide of horned or neat cattle inspected or tagged, to be paid by such butcher. Section 39, act No. 6, Laws of 1897. The service required by this statute to be performed was intended for the protection both of the butcher and the public, and its reasonable recompense can in no just sense be considered either a tax, toll, impost or municipal fine. We have therefore no jurisdiction over the matter in dispute in this case, and the appeal will be dismissed."

Opposing counsel also assert that the fee of ten cents per hide is excessive. The opinion of the New Mexico court in this case, as well as the separate opinion of Justice Pope, at pages 31 and 32 of the transcript, disposes of that objection. See also:

Chester City *vs.* Telegraph Co., 154 Pa. St., 464.
Western Union Tel. Co. *vs.* New Hope, 187 U. S., 425.

The inspection fee of ten cents per hide is appropriated by the law to defray the expenses of the board in making inspections and to no other purpose. It is true the funds collected on account of inspections are covered into the general funds of the cattle sanitary board. This was also true in the case of Patapsco Guano Company, *supra*.

No intention can be gathered from the law that any portion of the inspection fee is appropriated to purposes other than defraying the necessary expenses in making inspections and keeping a record thereof.

The observations of Chief Justice Fuller in the case of

Patapsco Guano Co. *vs.* North Carolina, *supra*, pages 353–354, are exactly in point:

> "Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. *If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge.*"

It is finally objected that the law in question discriminates between different classes of citizens.

It seems unnecessary to discuss this objection.

The law acts upon hides, not persons, and upon hides whosesoever they may be.

Whenever the law operates alike upon all persons and property similarly situated, equal protection is not denied. All that is required is that all persons subject to a law shall be treated alike

Mo. Pac. R. R. *vs.* Mackey, 127 U. S., 205.
Duncan *vs.* Missouri, 152 U. S., 377.
Giozza *vs.* Tiernan, 148 U. S., 657.

In the following cases cited by opposing counsel and by them relied on, viz: Minnesota *vs.* Barber, 136 U. S., 313; Brimmer *vs.* Rebman, 138 U. S., 78, and Voight *vs.* Wright, 141 U. S., 62, State laws were under consideration which discriminated against products of other States, and were for that reason condemned. In this case there is no such discrimination.

It is respectfully submitted that the judgment below should be affirmed.

CHAS. A. SPIESS,
D. J. LEAHEY,
A. C. CAMPBELL,
Attorneys for Appellee.